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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**  
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15  
16 **UNITED STATES OF AMERICA,**

17 **Plaintiff,**

18 **vs.**

19 **MOHAMMED YOUSEF CHAUDHRY**  
20 **AND**  
21 **ALI H. KAHN**

22 **Defendants.**

)  
) **CR03-40210 SBA**  
)  
)

) **DEFENDANT'S REPLY TO THE**  
) **UNITED STATES' OPPOSITION**  
) **TO DEFENDANT'S MOTION FOR**  
) **JAMES HEARING**

) **Date: 5/19/08**  
) **Time: 2:00 p.m.**  
) **The Honorable Judge Sandra Brown**  
) **Armstrong**  
)

23 **ARGUMENT**

24 **I.**

25 **THE GOVERNMENT HAS FAILED TO PROVIDE THE DEFENSE WITH ANY**  
26 **EVIDENCE THAT KAHN WAS INVOLVED IN A CHECK CASHING SCHEME**

27 In its opposition, the government makes several claims against Mr. Kahn for which no  
28 supporting evidence has been provided to the defense. Specifically, the government alleges that  
Mr. Kahn filed false Currency Transaction Reports ("CTR's"). But the government has failed  
to provide the defense of any evidence that Mr. Kahn filed any CTRs at all. The evidence

1 provided only suggests that Mr. Kahn may have filled in some CTRs at Mr. Chaudhry's  
2 direction, but never himself filed the documents. The government also alleges that Kahn  
3 participated in "cashing over 150 checks," but again provides no evidence to show that cashing  
4 checks was outside the scope of his employment or in any way unlawful. In fact, the  
5 government has failed to provide any evidence at all which defeats Mr. Kahn's contention that  
6 he was a mere low-level employee, doing simply what he was told and receiving only ordinary  
7 compensation that a low-level employee would. This troubling lack of evidence is exactly what  
8 necessitates a James hearing, compelling the prosecution to provide some kind of evidence that  
9 Mr. Kahn was in fact involved in any alleged conspiracy.  
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## 12 II.

### 13 14 **THERE IS NO EVIDENCE DEMONSTRATING THAT MR. KAHN WAS** 15 **INVOLVED WITH THE SALE OR DELIVERY OF COUNTERFEIT SOFTWARE**

16 In its opposition, the government alleges that employees at RT and AES were in the business  
17 of selling illegal software. But the government does not identify which employees it is referring  
18 to, nor does any of the evidence provided to the defense show or even imply that Mr. Kahn was  
19 involved in the sale of any illegal software. The prosecution also alleges that Mr. Kahn  
20 "participated in delivering the stolen software," but failed to provide the defense with any  
21 evidence to that effect.  
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23 The lack of evidence supporting all the above allegations can only arise from two  
24 possibilities, either the government's allegations are false, or it has failed to fully disclose  
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1 discovery materials to the defense. The best way to explain the lack of evidence would be to  
2 hold the James Hearing requested by the defense.  
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### 4 5 III.

#### 6 **HOLDING A JAMES HEARING IS APPROPRIATE IN THIS CASE AND WOULD** 7 **NOT UNDULY LENGTHEN THE MATTER**

8 The prosecution cites United States v. Watkins, 600 F.2d 201 (9th Cir., 1995) to support the  
9 contention that the Court may admit co-conspirator statements conditionally, but neglects to  
10 identify the standard for admitting those statements. The court in Watkins stated that statements  
11 of co-conspirators can be admitted only when ““independent proof of the existence of the  
12 conspiracy and of the connection of the declarant and the defendant to it’ [citation] . . . [t]he trial  
13 judge makes the initial determination whether a sufficient foundation has been established to  
14 make the declarations admissible [citation].” Watkins, 600 F.2d at 204.  
15

16 As discussed above, there is a total lack of evidence connecting Mr. Kahn to any conspiracy.  
17 Based on the discovery produced so far, the prosecution cannot honestly maintain that there is  
18 “independent proof” that a conspiracy existed and that Mr. Kahn was part of it. Absent such  
19 proof, it would be inappropriate for this Court to admit those statements, even if done so  
20 conditionally, without first holding a James Hearing. Such a hearing would prevent Mr. Khan  
21 from being unduly prejudiced by statements that are inadmissible.  
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23 The government also cited United States v. Medina, 761 F.2d 12 (1st Cir. 1985), a First  
24 Circuit case which has never been cited by the Ninth Circuit. The language in Medina cited by  
25 the prosecution is derived from a line of First Circuit cases, in particular United States v.  
26 Petrozziello, 548 F.2d 20 (1st Cir. 1997), which held that “if it is more likely than not that the  
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1 declarant and the defendant were members of a conspiracy when the hearsay statement was  
2 made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible.”

3 Id at p. 23.  
4

5 Unlike the facts in Medina, the prosecution in this case has failed to even meet the First  
6 Circuit’s standard for admitting co-conspirator statements. The prosecution has neither shown  
7 that “the declarant and the defendant were members of a conspiracy,” nor that the statements in  
8 question were made “in furtherance of the conspiracy.” All the government has demonstrated  
9 is that Mr. Khan worked for Mr. Chaudhry and that he cashed checks and partially filled out  
10 some CTRs, all in the ordinary course of his employment. Merely demonstrating employment  
11 is inadequate to show the existence of a conspiracy. Thus, the Court must hold a hearing and ask  
12 the prosecution to make such a showing if it seeks to introduce otherwise inadmissible hearsay.  
13

14 The prosecution also claims that holding a James Hearing would unduly lengthen the matter,  
15 but that is not the case. If the Court does not hold a James Hearing, then the Court will have to  
16 address the issue of admissibility during the jury trial. This inevitably would cause delay as the  
17 Court would have to frequently excuse the jury so that determinations of admissibility could be  
18 made outside their presence. The testimony would also be littered with objections and  
19 instructions by the Court, further slowing the trial and confusing the jury. It would be far quicker  
20 for the Court to hold a brief James Hearing before the jury is empaneled, allowing the Court and  
21 the attorneys to do their work free of interruption and procedural disputes. In the interest of  
22 saving time and judicial economy, the Court should address the admissibility of the statements  
23 in question as soon as possible.  
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**IV.****MR. CHAUDHRY'S POST-ARREST STATEMENTS WERE NOT MADE IN FURTHERANCE OF A CONSPIRACY AND THEREFORE ARE INADMISSIBLE**

The prosecution argues that Chaudhry's post-arrest statements are admissible because they were in furtherance of the alleged conspiracy, apparently because he was attempting to conceal the conspiracy from his wife. This conclusion, however, is simply an incorrect interpretation of the law. In Hawkins v. Bunnell, 16 Fed. Appx. 656 (9th Cir. 2001), which the prosecution relies on, the defendant had lied to an investigator regarding the alleged crime. *Id.* at p. 658. The court held that the defendant's statement to the investigator was in furtherance of the conspiracy because by concealing the conspiracy, the conspiracy was allowed to remain ongoing. *Id.*

Here, Chaudhry's statement was not made in furtherance of the conspiracy. Chaudhry was speaking to his wife, not the authorities. Concealing the alleged conspiracy from his wife could not possibly help keep the conspiracy going. In fact, the prosecution has neither provided any evidence to show nor alleged that the conspiracy continued after Chaudhry's arrest. Therefore, his post-arrest statements are inadmissible hearsay.

**CONCLUSION**

Due to the lack of evidence demonstrating Mr. Kahn's involvement in any conspiracy, this Court should hold a pretrial evidentiary hearing to determine the admissibility of the statements of Mr. Kahn's alleged co-conspirators. Even assuming the existence of a conspiracy,

1 the statements in question are still inadmissible hearsay, as they were not made during or in  
2 furtherance of a conspiracy.

3 **Dated: May 7, 2008**

**Respectfully submitted,**

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6 \_\_\_\_\_/s/  
7 **SETH P. CHAZIN**  
8 **Attorney for ALI KHAN**  
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SHORT TITLE: UNITED STATES VS. CHAUDRY AND KAHN

CASE NUMBER: CR-03-40210-SBA

## PROOF OF SERVICE

1. I served the attached ☒ DEFENDANT'S REPLY TO UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR JAMES HEARING ☐ Subpoena Duces Tecum by FAXING a copy of the opposition to notice of related case to the following person:

a. Persons served (name): KIRSTIN AULT (415) 436-7234  
ERIK BABCOCK (510) 452-8405

b. Address where served:

c. Date of delivery: 5/7/08

d. Time of delivery:

2. I received this subpoena for service on (date):

3. ☐ NON-SERVICE RETURN OF SUBPOENA

a. ☐ After due search, careful inquiry, and diligent attempts at the dwelling house or usual place or abode or usual place of business. I have been unable to make personal delivery of this ☐ Subpoena ☐ Subpoena Duces Tecum on the county on the following persons (specify):

b. Reason:

(1) ☐ Unknown at address: (4) ☐

(2) ☐ Moved, forwarding address unknown.

(3) ☐ No such address. (6) ☐

Out-of-county address.

(5) ☐ Unable to serve by hearing date.

Other reasons (explanation required):

4. Person serving:

a. ☒ Not a registered California process server.

b. ☐ California sheriff, marshal, or constable.

c. ☐ Registered California process server.

d. ☐ Employee or independent contractor of a

registered California process server.

e. ☐ Exempt from registration under Bus. & Prof. Code section 22350(b).

f. Name, address, and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date: 5/7/08

(For California sheriff, marshal, or constable use only)  
I certify that the foregoing is true and correct:

Date:

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(SIGNATURE)

> \_\_\_\_\_

(SIGNATURE)